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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ALFONSO SOLANO GUIZAR, Defendant and Appellant.	F068948 (Super. Ct. No. VCF274111) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Tulare County. Valeriano Saucedo, Judge.

Rex Adam Williams, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Rebecca Whitfield, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Kane, Acting P.J., Detjen, J. and Smith, J.

INTRODUCTION

A jury convicted Alfonso Solano Guizar of violating Health and Safety Code section 11358, cultivating marijuana.[1] He contends his conviction should be reversed because the trial court erred in excluding evidence of his medical marijuana recommendation. We affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

On October 4, 2012, at approximately 10:00 a.m., Tulare County Sheriff's Deputy William Salinas went to a home on Road 64 in Dinuba. Salinas searched the grounds surrounding the home and found three different plots where something had been growing. The plots did not contain any growing marijuana plants.

Salinas found three documents on the fence surrounding the plots. The documents appeared to be medical marijuana recommendations. Guizar's name was on one of the documents. The names on the other two documents were Jose Herrera and Juan De La Fuente.

The paper with Guizar's name indicated Guizar was limited to having 90 mature plants or six pounds of processed marijuana. The documents with Herrera's and De La Fuente's names limited them to the same quantities. In combination, the documents would allow for a total of 270 plants or 18 pounds of processed marijuana.

Salinas encountered Guizar near one of the plots of land. Salinas asked Guizar for his name and where he lived; Guizar responded and stated he lived in the open-sided barn. Salinas saw three cots in the barn, indicating to him that multiple people lived on the premises. Branches of marijuana were hanging from multiple lines strung across the barn; the plants appeared to be mature.

Salinas inspected a second barn on the property. The second barn had stems, leaves, and other discarded plant matter on the floor. It appeared to Salinas that this

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[1] All further statutory references are to the Health and Safety Code unless otherwise noted.

building had been used for pruning the plants. In Salinas's expert opinion, the plant matter in the second barn was consistent with the harvesting, processing, and distribution of marijuana.

Salinas collected a 10-pound sample of marijuana and the remainder was loaded onto a trailer for disposal. The amount loaded onto the trailer weighed 920 pounds. Salinas estimated that the 920 pounds, which included branches and leaves, would yield approximately 575 pounds of usable marijuana. In Salinas's opinion, a mature marijuana plant typically yields three-fourths to one pound of marijuana. Deputies removed the metal fence enclosing the plots.

On November 7, 2012, an information was filed charging Guizar with possession of marijuana for sale (count 1) and cultivation of marijuana (count 2). Guizar pled not guilty to both counts.

At trial, Herrera testified that he suffered from epilepsy and diabetes. He had used marijuana for his illnesses for the past three years. Herrera had gone to a doctor who gave him a document; Herrera understood the document would allow him to grow marijuana. Guizar and De La Fuente helped him grow marijuana, while also planting for themselves.

On October 3, 2012, an officer came to Herrera's home. After the officer left, Herrera and Guizar pulled out all the marijuana plants. On October 4, a sheriff's deputy talked to Herrera. Herrera told the deputy he had already pulled out the marijuana plants. Herrera testified he was unaware there were 920 pounds of marijuana hanging from the ceiling of his open-sided barn.

Guizar testified that in 1994 he suffered a work-related injury to his back. Guizar had been told he needed surgery, but his insurance would not pay for it and the surgery was very expensive. The prescribed medication also was expensive, so he started smoking marijuana for the pain.

In 2012, Guizar moved from Texas to California to work as a farm laborer. He had relatives in the Madera, Kerman, and Fresno areas, so he moved near these areas. He met Herrera, who was married to his niece. Herrera discussed with Guizar growing marijuana under the California Compassionate Use Act of 1996 (§ 11362.5).

In April 2012, Guizar went to a doctor to get a medical marijuana recommendation. The doctor gave him a document and, afterwards, Guizar began growing marijuana for himself and Herrera. Guizar testified he planted 80 plants for himself and another 80 for Herrera in May of 2012.

De La Fuente also planted marijuana on Herrera's property around that same time. According to Guizar, he and De La Fuente tended their own marijuana plants. They jointly tended Herrera's because he was not capable of tending the plants himself. Herrera was in a wheelchair and could not be outdoors for long periods of time.

This was Guizar's first attempt at growing marijuana and he did not know how much usable marijuana would be obtainable from a single seed. Guizar spent two hours a day tending to the marijuana and the rest of the day he helped Herrera tend to his ranch in exchange for monetary payment. Guizar also worked for other employers. Guizar had a room at Herrera's house where he slept, but the room did not have air conditioning. When it was hot, Guizar would go to the open-sided barn to rest.

On October 3, 2012, Guizar saw two people go to Herrera's home—one in civilian clothes and the other in a law enforcement uniform. After the two men left, Herrera called Guizar. Around noon that same day, Guizar, his son, and De La Fuente began pulling all the marijuana plants out of the ground.

Guizar and De La Fuente began removing the plants by cutting all the branches and then hanging them in the open-sided barn. Guizar's son then pulled out all the plants from the ground. They finished pulling the plants and hanging the branches around 5:00 p.m. on October 3, 2012. Guizar testified he intended to destroy any marijuana that was in excess of the six pounds each was allowed.

On October 4, 2012, Guizar was present when approximately 15 deputies and one civilian came onto Herrera's property. De La Fuente was not there at the time. Guizar showed the deputies that he had hung marijuana branches to dry and had pulled out and discarded the marijuana plants. The deputies told Guizar to sit down and not move; the deputies took the marijuana recommendations that Guizar had shown them.

Jeff Nunes testified for the defense; he had had extensive experience with the cultivation of marijuana. Nunes testified he had gone to the sheriff's department and observed the marijuana seized as the 10-pound sample. In Nunes's opinion, the marijuana had not been processed and there was no usable marijuana in the seized amount. Nunes did acknowledge that the cannabis seized was from a mature plant.

According to Nunes, it is impossible to estimate the weight of processed marijuana from an unprocessed plant. The weight of marijuana comes mostly from the oils in processed marijuana, and without more specific facts about the growing process, one cannot guess the weight. Nunes opined that 60 to 65 percent of a cannabis plant is unusable byproduct; 35 to 40 percent is usuable product. Once cannabis is dried, another 75 percent of the weight is lost because the water weight evaporates.

Salinas testified in rebuttal. He did not agree with Nunes's opinion that only 35 to 40 percent of a marijuana plant is usable. In this case, Salinas took a 10-pound bag of marijuana and cut off the usable portion; it amounted to 61.9 percent of the total marijuana. The marijuana was substantially dry when Salinas took his sample.

The jury acquitted Guizar of the count 1 offense, but found him guilty of the count 2 offense, cultivating marijuana. The trial court suspended imposition of sentence, granted probation with terms and conditions, and imposed various fines and fees. Guizar filed a notice of appeal on February 11, 2014.

DISCUSSION

The sole contention raised by Guizar in this appeal is that the trial court erred in excluding evidence of Guizar's medical marijuana recommendation. This contention lacks merit.

Pretrial Hearing

On November 19, 2013, the People filed a motion in limine; the motion sought inter alia to exclude evidence of any medical marijuana recommendation as hearsay unless Guizar produced the physician to testify. At the January 14, 2014, hearing on the motion, the People argued they were not attempting to exclude any evidence relating to a medical marijuana defense but only to exclude hearsay evidence relating to the defense. The People maintained that Guizar could not take the stand and testify that a doctor had recommended the use of marijuana to him. Such testimony would be hearsay.

Defense counsel informed the trial court that a subpoena for medical records had been delivered personally to the medical offices; the trial court noted there had been no return on the subpoena. Defense counsel also suggested that Guizar could testify he had gone to the doctor, the doctor examined him, and the doctor recommended marijuana. The People opined that for Guizar to so testify would be hearsay; the trial court agreed.

The People pointed out that on November 19, 2013, the trial date was vacated, over the People's objection, in order to allow the defense to subpoena medical records. At that time, the People had proposed a stipulation rather than vacate the trial date. The subpoena for medical records was not served until December 31, 2013, which was only two weeks before the rescheduled trial date. The People also pointed out that at the trial confirmation one week earlier, the defense was made aware that no subpoenaed records had been received by the clerk of the court.

The trial court indicated that if the subpoenaed records were delivered to the court with an appropriate declaration from the custodian of records, they would be considered;

however, a witness would not be allowed to testify that he had seen a doctor and that the doctor had recommended medical marijuana, as that would be hearsay.

In response, defense counsel stated, "we will accept … this Court's ruling with respect to that." Defense counsel went on to state, however, that a medical marijuana recommendation could be oral. The trial court responded, "It still does not address the hearsay exception." The trial court indicated it would allow the use of the medical marijuana recommendation for a limited purpose.

Analysis

The documentary evidence sought to be admitted was the written recommendation for use of medical marijuana; the oral evidence sought to be admitted was Guizar's and Herrera's own testimony as to the contents of the recommendations. We review the trial court's ruling on the admissibility of evidence for abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 723.)

To the extent Guizar is asserting on appeal that he should have been allowed to admit into evidence a doctor's written recommendation that he use marijuana because such a recommendation is not hearsay, but "operative facts," this contention is forfeited. Guizar did not assert this argument in the trial court and cannot do so for the first time in this appeal. (*People v. Clark* (1993) 5 Cal.4th 950, 988, fn. 13.) Additionally, when the trial court ruled that the written recommendation itself would not be admitted absent a declaration from the physician or affidavit of a custodian of records, Guizar accepted the ruling. Acquiescing in the ruling forfeits the issue on appeal. (*Chyten v. Lawrence & Howell Investments* (1994) 23 Cal.App.4th 607, 617–618.)

Moreover, if the medical marijuana recommendation was not sought to be admitted for the truth of the statements therein, then the written document was irrelevant to establishing a compassionate use defense. The only possible reason for Guizar to have admitted the written medical marijuana recommendation was for the truth of its contents—that it was a physician's recommendation authorizing his use of marijuana for

medical purposes. Section 11362.5, subdivision (d) provides that patients "'who obtain and use marijuana for medical purposes upon the recommendation of a physician'" have a defense to criminal prosecution for possession and cultivation so long as the code section's provisions are satisfied. (*People v. Mower* (2002) 28 Cal.4th 457, 482.) When the purpose of the medical marijuana recommendation is to establish the truth of its contents, namely, that Guizar had a valid medical marijuana recommendation, it would have constituted hearsay if Guizar had testified to its contents. (Evid. Code, § 1200, subd. (a).) Hearsay is inadmissible. (*Id.*, subd. (b).)

As the trial court stated, the written recommendation for use of medical marijuana was not admissible through the testimony of Guizar. Multiple courts have addressed the issue of admissibility of a written recommendation for use of marijuana in the context of a compassionate use defense. In *Littlefield v. County of Humboldt* (2013) 218 Cal.App.4th 243, the plaintiffs failed to submit any declaration from a medical practitioner regarding their medical marijuana recommendation. (*Id.* at p. 256.) The trial court considered the "written medical marijuana recommendations for their effect on a reasonable officer assessing the existence of probable cause but excluded their use as hearsay to prove legal possession." (*Ibid.*) The appellate court affirmed the ruling as "sound." (*Ibid.*)

In *People v. Windus* (2008) 165 Cal.App.4th 634, the recommending physician testified at an Evidence Code section 402 hearing to establish the existence of the medical marijuana recommendation and its contents and the right to assert the defense set forth in section 11362.5. (*Windus*, at pp. 638–639.) In *People v. Waxler* (2014) 224 Cal.App.4th 712, the defendant attached a "valid physician's statement recommending the use of marijuana for medical conditions" in moving to suppress evidence. (*Id.* at p. 717.)

Even if the trial court's evidentiary ruling was error, as Guizar contends, the record demonstrates that any error was harmless, contrary to Guizar's assertion on appeal.

Although the trial court properly excluded from evidence the physician's written recommendation as hearsay, Guizar was able to orally introduce evidence of the recommendation, despite the trial court's ruling on the motion in limine. Both Guizar and Herrera testified at trial that they had gone to a doctor for pain to obtain a recommendation for use of marijuana; they were examined by a doctor; and the doctor gave them a "document," after which they began growing marijuana. In addition, Salinas testified that he found what appeared to be three marijuana recommendations on the fence that allowed Guizar, Herrera and De La Fuente 90 mature plants or six pounds of processed marijuana each.

The trial court instructed the jury on the defense provided for in the Compassionate Use Act.

> "Possession of marijuana is lawful if authorized by the Compassionate Use Act. In order for the Compassionate Use Act to apply, the defense must produce evidence tending to show that his possession or cultivation of marijuana was for personal medical purposes with a physician's recommendation or approval. The amount of marijuana possessed must be reasonably related to the patient's current medical needs. The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess or cultivate marijuana for medical purposes or that the defendant, if authorized, possessed or cultivated an unauthorized amount or for an unauthorized purpose. If the People have not met this burden, you must find the defendant not guilty of this crime." (Former CALCRIM No. 2370.)

The jury submitted multiple questions after it retired to deliberate, all of which indicated that the jury found Guizar had produced evidence tending to show his cultivation of marijuana was for personal medical purposes with a physician's recommendation. The jury asked if the number of holes in the plots had been counted, if Guizar or the others had knowledge of the county's guidelines on marijuana growth, if they knew whether plants no longer were measured as such once cut but measured by processed weight, if they knew it might not take 90 plants to satisfy the recommendation,

and if this was an "honest[] misconception" by defendant as to the amount of plants needed.

Clearly, the jurors' questions indicated the jury accepted that there was a medical marijuana recommendation. The questions also indicated the jurors were attempting to correlate the quantities recovered in relation to the quantities specified in the recommendation, as it applied to the compassionate use defense. The verdict demonstrates that ultimately, although the jury clearly operated on the belief Guizar and the other two men had medical marijuana recommendations, the quantity testified to by Salinas, about 575 pounds of usable marijuana, far exceeded the medical recommendations. It is apparent from the verdict that the jury did not find Guizar was growing marijuana for sale, but did find that he possessed or cultivated an unauthorized amount.

DISPOSITION

The judgment is affirmed.